



[Billing Code: 6750-01S]

FEDERAL TRADE COMMISSION

16 CFR Part 240

Guides for Advertising Allowances and Other Merchandising Payments and Services

AGENCY: Federal Trade Commission.

ACTION: Final changes to guides.

SUMMARY: The Federal Trade Commission (“the Commission”) previously published in the Federal Register a request for public comments on the overall costs and benefits of and the continuing need for its Guides for Advertising Allowances and Other Merchandising Payments and Services (“the Guides”). The Commission issued this request as part of its program for periodic review of its rules and guides to ensure they are up-to-date, effective, and not overly burdensome.

DATES: This action is effective as of November 10, 2014.

FOR FURTHER INFORMATION CONTACT: Michael J. Bloom, 202-326-2475, or Julie A. Goshorn, 202-326-3033, Federal Trade Commission, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION:

Background.

The Commission originally issued the Guides in 1969 to help businesses comply with sections 2(d) and 2(e) of the Robinson-Patman Act (“R-P Act” or “the Act”). The Guides were last revised in 1990, to bring them into conformity with then-current legal developments and to eliminate nonessential requirements. *See* 55 FR 33651 (Aug. 17, 1990). The changes published in this document reflect more recent legal developments as well as changes in technology and

methods of marketing that have occurred since the Guides were last reviewed, such as the emergence of the Internet and widespread online marketing.¹

As the name suggests, the Guides are not binding regulations, but are advisory interpretations providing assistance to businesses seeking to comply with sections 2(d) and 2(e) of the R-P Act.² These sections generally prohibit a seller from paying allowances or furnishing services to promote the resale of its products unless the allowances or services are offered to all competing customers on proportionally equal terms. Sections 2(d) and 2(e) relate to the resale of a firm's products, as opposed to section 2(a) of the Act, which relates to the original or first sale.

The R-P Act is the principal federal statute directed at price discrimination. The principal provision of the Act is section 2(a), which bans direct or indirect discrimination in price when competitive injury might result. Certain defenses are allowed, notably that the difference in price is justified by cost differences or that the lower price is given to meet an offer of a seller's competitor.

¹ See 77 FR 71741 (Dec. 4, 2012) (request for public comments).

² 15 U.S.C. 13(d) (section 2(d) of the R-P Act) reads: "[I]t shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

15 U.S.C. 13(e) (section 2(e) of the R-P Act) reads: "[I]t shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

Sections 2(d) and 2(e) are complements to section 2(a). Their purpose is to prohibit disguised price discriminations in the form of promotional payments or services. Sections 2(d) and 2(e) thus attempt to prevent evasions of section 2(a). In contrast to section 2(a), sections 2(d) and 2(e) do not require proof of likely adverse competitive effects, nor do they permit a cost-justification defense. They do, however, permit a meeting-competition defense. The Commission has observed that the *per se* unlawful characteristics of sections 2(d) and 2(e) impose an obligation on the FTC and the courts “to ensure that the jurisdictional prerequisites of these sections are reasonably, and not expansively, construed.” *Herbert R. Gibson, Sr.*, 95 F.T.C. 553, 726 (1980), *aff’d sub nom. Gibson v. F.T.C.*, 682 F.2d 554 (5th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983).

The Commission issued the Guides in 1969 at the invitation of the Supreme Court in *F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341 (1968). The Guides address the main issues of sections 2(d) and 2(e)—the measurement of proportionally equal treatment, the concept of availability of offers to competing customers, the notification of offers required to be given to customers, and other issues such as the interstate commerce requirements of section 2(d) and 2(e).

Developments in technology, methods of commerce, and the law since the last revision of the Guides suggest that certain provisions of the Guides might usefully be revised. As identified in the Commission’s request for public comments, these developments include the emergence of the Internet as an important retail sales and communications channel. They also include a jurisprudential development: some courts have discussed the possibility that under some circumstances an apparent promotional allowance may constitute an indirect price discrimination, for which an action against the recipient for knowing inducement or receipt of a

discrimination in price might lie under § 2(f) of the R-P Act. *See, e.g., American Booksellers Ass’n v. Barnes & Noble*, 135 F. Supp. 2d 1031 (N.D. Calif. 2001). These cases signal a heightened risk of liability in connection with promotional allowances and services of which businesses and their counselors may wish to take account. These developments in technology, methods of commerce, and the law have influenced the changes to the Guides set forth here. The legislative history of the Act and the case law pertinent to each issue also have been considered.

In response to the Commission’s request for public comments, the Commission received and considered seven submissions. These were submitted by the American Antitrust Institute (“AAI”); the Section of Antitrust Law of the American Bar Association (“the Antitrust Section”); the Food Marketing Institute (“FMI”); the National Automobile Dealers Association (“NADA”); the National Community Pharmacists Association (“NCPA”); Richard Steuer, Esq.³; and the National Grocers Association (“NGA”). The Commission has considered each of these comments in its entirety. The following discussion summarizes comments relating to the continuing need for and cost-effectiveness of the Guides. It then addresses certain specific recommendations of commenters, as well as the Commission’s actions with respect to those recommendations.

Continuing Need for the Guides.

The Guides are intended to assist businesses seeking to comply with sections 2(d) and 2(e) of the R-P Act. To determine whether the Guides continue to do so, the Commission asked about the continuing need for the Guides. In addition, the Commission asked about the benefits

³ Mr. Steuer’s comment was in the form of an article published elsewhere and submitted for the Commission’s consideration in connection with its review of the Guides.

and costs of the Guides, and changes, if any, that might increase the Guides' benefits or reduce their costs.

Every comment that addressed the question concluded that there is a continuing need for the Guides. The Antitrust Section noted that "lawyers, industry, and the courts have generally relied on [the Guides] as accurate statements of the law." FMI stated that "the Guides serve a useful purpose and should be retained." NADA concluded that the Guides "provide a great deal of certainty for manufacturers and dealers alike." NGA reported that it "has strongly supported the Fred Meyer Guides because of the assistance and guidance they provide to buyers, sellers, and their counsel in assuring voluntary compliance with Sections 2(d) and (e) of the Act."

None of the comments identified a need for a major overhaul to the Guides to improve the balance between benefits and costs. Rather, some comments urged various changes to update the Guides in keeping with the commenters' view of legal, technological, and commercial developments. For example, the Antitrust Section recommended that "the Commission should revise the Guides to bring them into conformity with current case law and technology." NADA agreed, noting that "[s]ensible, limited changes to reflect modern market conditions" should be made, while urging the Commission "to reject calls to make significant changes to the Guides where there is no pressing need" to do so. FMI suggested that the Guides should be revised "to reflect developments in the law and changes in distribution and marketing practices."

For these reasons, the Commission will retain the Guides in their current form, making specific changes as discussed below. (Section numbers below starting with 240 refer to sections of the Guides.)

Discussion of Public Comments and Changes to the Guides.

Section 240.2 – Applicability of the law.

Several comments are relevant to this section of the Guides, which identifies the essential elements of section 2(d) and 2(e) violations.

Three of the comments—those of the Antitrust Section, AAI, and FMI—urged the Commission to modify the 1990 Guides in ways that seemingly would add an “injury to competition” element to sections 2(d) and 2(e). For example, the Antitrust Section urged the Commission to “ma[ke] clear at the outset of the Guides” that sections 2(d) and 2(e) are “aimed at significant harm to competition.” An FMI comment was to similar effect. And AAI noted its continued adherence to the proposition that a plaintiff “challenging favoritism in promotional allowances or services . . . should be required to prove that the discrimination is likely to cause competitive injury” One of the seven comments received, that of NGA, opposed any change that would, in effect, engraft an “injury to competition” element onto sections 2(d) and 2(e).

The Commission noted in its 1990 review of the Guides that sections 2(d) and 2(e) are complements to section 2(a), which bans certain discriminations in price “when a specified competitive injury might result.” Sections 2(d) and 2(e) are intended “to prohibit disguised price discriminations in the form of promotional payments or services”; they “attempt to prevent evasions of section 2(a).” 55 FR 33651. And “in contrast to section 2(a), they do not require proof of likely adverse competitive effects” *Id.* No comment pointed to any court decision calling these principles into question. *Volvo Trucks North America v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006) (holding that a manufacturer may not be liable under the R-P Act without a

showing that it discriminated between dealers competing to sell to the same customer), cited in the Antitrust Section comment and others, was decided under section 2(a) of the Act and did not address the standards for proving a violation of sections 2(d) or (e).

Revising the Guides to suggest that sections 2(d) and 2(e) plaintiffs must prove likely injury to competition therefore would not be supportable in the case law, even though requiring proof of likely injury to competition is sound enforcement policy. Accordingly, stating that sections 2(d) and 2(e) require such a showing might not provide accurate guidance to the business community about the risks of private litigation. Therefore, the Commission did not revise the Guides to suggest that a competitive injury element to section 2(d) or 2(e) of the Act can be fairly implied based on the current state of the law. However, consistent with the Supreme Court's expressed view in *Volvo Trucks*, 546 U.S. at 181, that the Robinson-Patman Act should be construed to be consistent with the antitrust laws generally, the Commission has modified section 240.13 of the Guides, which relates to Section 5 of the FTC Act, to reflect its own view that Section 5 should be used only in cases of likely harm to competition.

In another comment, Richard Steuer urged that the Act be interpreted such that it would be "lawful to charge different prices and provide different promotional assistance, if the combined value of the discounts and promotional assistance to each retailer is of equal value." Mr. Steuer asserted that this would resolve a quandary created by the Act as conventionally interpreted, because "[d]ealers more often treat money as fungible, whether it is in the form of a discount, a rebate, or a credit, and whether earmarked for advertising and promotion or not." The Commission is unaware of any court that has so-interpreted the R-P Act, however, and such an interpretation seemingly conflicts with the explicit terms of the Act, in which Congress

separately, and differently, addressed discrimination in price (in section 2(a)) and discrimination in the provision of promotional allowances and services (in sections 2(d) and 2(e)). Revision of the 1990 Guides to reflect Mr. Steuer's premise would be inconsistent with the purpose of the Guides, which is to assist businesses in complying with the Act as it is currently understood.

Section 240.4 – Definition of customer.

A Note appended to the definition of “customer” in the 1990 Guides provides that, “a retailer or [sic] purchasing solely from other retailers . . . will not be considered a ‘customer’ of the seller unless the seller has been put on notice that such retailer is selling its product.” The Antitrust Section urged the Commission to delete the limiting phrase, “unless the seller has been put on notice that such retailer is selling its product.” According to the Antitrust Section, that revision would better conform to the congressional intent underlying the Act as reflected in *Falls City Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983) and reduce “unnecessary” compliance costs.

The Commission believes that the Note as currently written is consistent with the intent underlying the Act and does not impose unreasonable compliance costs. The Commission does not read *Falls City*, which pre-dated the 1990 review of the Guides, to the contrary. Sections 2(d) and 2(e) of the Act require that competing purchasers be treated similarly. The Note already recognizes an exception to this principle when the seller is unable to identify the purchaser to provide it with promotional allowances or services. Where, however, the seller does know the

identity of a purchaser, there is no appropriate basis for denying similar treatment. Therefore, the Note appended to section 240.4 remains substantively unchanged.⁴

Section 240.5 – Definition of competing customers.

In its request for public comments on the Guides, the Commission asked whether and how the 1990 Guides should be revised to take into account new methods of commerce associated with the growth of the Internet since 1990. Every commenter that addressed this question agreed that the growth of Internet commerce is an important development, and that the Guides should be understood to apply to Internet commerce. In response, the Commission has added references to the Internet to the lists of promotional media dispersed throughout the Guides.

AAI noted that online retail sales in the United States are expected to reach \$155 billion by 2014, and that, “[f]or a particular brand, . . . Internet-based resellers may compete with their brick and mortar counterparts.” AAI concluded that differences in reseller formats, consumer demand, and other things “will affect this determination.” Similarly, the Antitrust Section observed that “Internet retailers . . . are potential competitors of every other retailer that sells the same or comparable products.” More specifically, AAI observed that in the past two decades some reseller formats have increased in sophistication and others have newly emerged, including “company-owned stores, interactive kiosks, vending machines, and home shopping networks.” According to AAI, “[d]epending on the circumstances, these new formats may compete with one another and more traditional reseller formats and accordingly be considered competing

⁴ The Commission has corrected a nonsubstantive error in the text. In the phrase quoted at the beginning of this section, the word “or” appearing immediately before “purchasing” has been

customers” for purposes of the Robinson-Patman Act. These commenters requested that in reviewing and revising the 1990 Guides, the Commission consider the implications of retailers increasingly selling online and through these other formats.

The Commission agrees that retailers, whether operating through brick-and-mortar stores, online, or through other formats, may be competing customers of a seller under the Act, and might therefore be entitled to proportionally equal promotional allowances and services. Such retailers are more likely to be deemed competing customers to the extent that they: purchase goods of like grade and quality from the same seller for resale; and contemporaneously market those goods to the same or similar prospective purchasers (among others). In determining whether retailers using different retail formats should be deemed “competing customers in the distribution of such products or commodities,” it will be relevant to consider the particular characteristics of the retailers’ formats, the location and characteristics of the retailers’ target and actual customers, and other factors.

To the extent that retailers are competing customers of a seller, they may be entitled to proportionally equal promotional allowances and services. Neither the developed law nor commenters on the Guides have provided any detailed guidance as to how sellers should, or currently do, make their promotional allowances and services available on proportionally equal terms across reseller formats, such as brick-and-mortar and online sales. No single means of doing so is required, and a seller’s application of common sense and good faith will be relevant in assaying efforts to proportionalize promotional allowances and services across different sales formats.

deleted.

Section 240.6 – Interstate commerce.

The 1990 Guides suggest that the “interstate commerce” requirement for application of sections 2(d) and 2(e) “may be” satisfied “if there is any part of a business which is not wholly within one state (for example, sales or deliveries of products, their subsequent distribution or purchase, or delivery of supplies or raw materials).” The Antitrust Section commented that the greater weight of judicial authorities supports a narrower “interstate commerce” requirement, and urged that the Commission revise the 1990 Guides to apply only to promotional allowances and services “relating to transactions as to which at least one of the sales crosses state lines.” An FMI comment was to similar effect. The Commission considered and rejected similar suggestions in its 1990 review of the Guides, and none of the current commenters has provided new authority in support of a different conclusion now.

The Commission agrees that sections 2(d) and 2(e) may be interpreted to require sales that cross state lines, as described by the Antitrust Section and FMI. *See, e.g., Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870 (9th Cir. 1983), *cert. denied* 460 U.S. 1085 (1983). But the authorities are not of one mind. For example, in *Shreveport Macaroni Mfg. Co. v. FTC*, 321 F.2d 404, 408 (5th Cir. 1963), *cert denied*, 375 U.S. 971 (1964), the court held that the “interstate commerce” requirement of section 2(d) is satisfied where a promotional allowance moves in interstate commerce, even if no sale crossed state lines.⁵ The Guides do not purport to settle the question. Rather, they purposefully note that sections 2(d) and 2(e) “may be”

⁵ There also are several decisions arising under section 2(c) of the Act finding the “commerce” requirement to be satisfied where both parties to an intrastate transaction are otherwise engaged

applicable in certain circumstances in addition to those in which one of the sales was itself in interstate commerce. That is appropriate given the uncertain law and the fact that the Guides seek to demarcate a safe path for businesses seeking to navigate the Act.

Section 240.7 – Services or facilities.

Section 240.7 of the Guides identifies the types of services and facilities covered by sections 2(d) and 2(e) of the Act. As section 240.7 currently explains, only services and facilities “used primarily to promote the resale of the seller’s product by the customer” are covered, whereas services and facilities used primarily to promote a product’s initial sale are covered by section 2(a) of the Act. Some commenters suggested that differentiating between a product’s initial sale and its resale has at times been difficult in practice, and that the Commission should try to provide additional guidance. In particular, AAI suggested that further guidance be provided with respect to the classification of the diverse fees and allowances that have come to be referred to as slotting allowances.⁶ FMI similarly urged that the Commission clarify the applicability of the Act to “shelf-space” allowances.

The Commission agrees that additional guidance would be helpful.⁷ To that end, the Commission has added an Example following the list of examples of promotional services and

in interstate commerce. *See, e.g., Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12 (6th Cir. 1943).

⁶ “Slotting fees and allowances” initially referred to one-time payments made by a supplier to a retailer as a condition for the initial placement of the supplier’s product on the retailer’s store shelves or for initial access to the retailer’s warehouse space. *See, e.g., “Slotting Allowances in the Retail Grocery Industry,”* FTC Staff Study (November 2003), <http://www.ftc.gov/os/2003/11/slottingallowancerpt031114.pdf>. The use of the term has since broadened to include a variety of product placement arrangements. *See, e.g.,* AAI comment at 8.

⁷ The Commission briefly discussed discriminatory purchase-of-shelf-space requirements in the Federal Register notice publishing the 1990 Guides: “Section 2(d) applies more readily” to

facilities at the end of section 240.7 of the Guides. It provides: “*Example 1*: A seller offers a supermarket chain an allowance of \$500 per store to stock a new packaged food product and find space for it on the supermarket’s shelves and a further allowance of \$300 per store for placement of the new product on prime display space, an aisle endcap. The \$500 allowance relates primarily to the initial sale of the product to the supermarket chain, and therefore should be assessed under section 2(a) of the Act. In contrast, the \$300 allowance for endcap display relates primarily to the resale of the product by the supermarket chain, and therefore should be assessed under section 2(d).”

Section 240.7 contains a list of “some examples . . . of promotional services and facilities covered by sections 2(d) and 2(e), such as cooperative advertising, catalogues, displays, and special packaging or package sizes.” The Antitrust Section urged that “special packaging and package sizes” be deleted from the list because “the established law is now clear that partial refusals to deal with particular resellers, including refusals to sell them particular products in a product line, are not covered by the [R-P Act].” NGA opposed that suggestion, stating that the discriminatory provision of special packaging and package sizes continues to be used to advantage “power buyer[s]” when they are given the option to purchase special packaging or package sizes and competing customers are not, thereby creating “class of trade distinctions.”

payments for “a preferential position within the store that would enhance resale,” than to “payments for admittance to a store.” 55 FR 33662 (Aug. 17, 1990). The only reference to this subject in the Guides themselves is in footnote 1 to Example 5 following section 240.9. That footnote provided minimal guidance, stating only that, “[t]he discriminatory purchase of display or shelf space, whether directly or by means of allowances, may violate the Act” With the addition of the new example described in the text, footnote 1 becomes superfluous, and the Commission has deleted it.

All of the decisions cited by the Antitrust Section predate the Commission's 1990 revision of the Guides, and none of them squarely addressed the question of whether the provision of special packaging or package sizes to only some competing customers may violate section 2(e) of the Act. For example, *Purdy Mobile Homes v. Champion Home Builders*, 594 F.2d 1313 (9th Cir. 1979), cited by the Antitrust Section, held that the refusal of a mobile home manufacturer (Champion) to sell two additional lines of mobile homes to a retailer (Purdy) to which it had sold another line did not constitute discrimination in the provision of services or facilities connected with the resale of the line of mobile homes that Champion did sell to Purdy. Champion's refusal to sell additional lines of products is quite different from a hypothetical seller's refusal to provide special packaging or package sizes of the same product. The other decisions cited by the Antitrust Section also are distinguishable.⁸

"Special packaging, or package sizes" are retained in the Guides' list of covered promotional services or facilities. However, the Commission has concluded that additional guidance may be helpful to users of the Guides, to underscore that special packaging or package sizes are covered only insofar as they primarily promote a product's resale. Accordingly, the Commission has added two Examples following the list of examples of promotional services and facilities. The first new Example states: "*Example 2*: During the Halloween season, a seller of

⁸ *Black Gold, Ltd. v. Rockwool Indus. Inc.*, 729 F.2d 676 (10th Cir. 1984), *cert. denied* 469 U.S. 854 (1984), concluded that a refusal to deal in a different product line was not a discriminatory sale under section 2(a) of the R-P Act. *L&L Oil Co. v. Murphy Oil Corp.*, 674 F.2d 1113 (5th Cir. 1982), held that a fuel oil refiner's imposition on a customer of unfavorable allotments and delivery terms did not violate sections 2(a) and 2(e) of the R-P Act because delivery was neither a covered service nor one promoting the customer's resale of the fuel oil. Finally, *Mullis v. Arco Petroleum*, 502 F.2d 290 (7th Cir. 1974), addressed the question whether sections 2(a) and 2(d) of the R-P Act or the Sherman Act protected a local jobber from otherwise lawful termination, and concluded that neither did.

multi-packs of individually wrapped candy bars offers to provide those multi-packs to retailers in Halloween-themed packaging. The primary purpose of the special packaging is to promote customers' resale of the candy bars. Therefore, the special packaging is a promotional service or facility covered by section 2(d) or 2(e) of the Act." The second new Example states: "*Example 3: A seller of liquid laundry detergent ordinarily packages its detergent in containers having a circular footprint. A customer asks the seller to furnish the detergent to it in special packaging having a square footprint, so that the customer can more efficiently warehouse and transship the detergent. Because the purpose of the special packaging is primarily to promote the original sale of the detergent to the customer and not its resale by the customer, the special packaging is not a promotional service or facility covered by section 2(d) or 2(e) of the Act.*"

NADA suggested adding an example to the non-exhaustive list of covered promotional services or facilities in section 240.7 in recognition of the prevalence of Internet-based platforms in the advertising and sale of products. The Commission agrees that it may be useful to make explicit the application of the Guides to those platforms, and therefore has added "online advertising" to the list of examples in section 240.7.

Finally, the Commission declines to adopt the Antitrust Section's suggestion that section 240.7 be revised by deleting the word "primarily" from the definition of covered services or facilities, which states that a covered service or facility is one that is "used primarily to promote the resale of the seller's product." Deletion of the word "primarily" would imply that services or facilities are covered under sections 2(d) and 2(e) of the Act only if they do not promote, in any measure, the initial sale of the product. But a service or facility provided by a seller to its customers may somewhat promote the initial sale of a product, while its predominant effect is to

promote the product's resale. Neither of the two judicial decisions cited in the comment addresses such a situation.⁹ The Commission does not think it appropriate to adopt so-limited a construction of the scope of sections 2(d) and 2(e) in the Guides.

Section 240.8 – Need for a plan.

Section 240.8 states that “[a]lternative terms and conditions should be made available to customers who cannot, in a practical sense, take advantage of some of the plan’s offerings.” The Antitrust Section and FMI asserted that this language is overly restrictive, and that a plan should suffice so long as a customer can take advantage of *any* of the offerings. The Commission agrees, and has revised the section as follows: “Alternative terms and conditions should be made available to customers who cannot, in a practical sense, take advantage of any of the plan’s offerings.”

Section 240.8 further states that “[t]he seller should inform competing customers of the plans available to them, in time for them to decide whether to participate.” The Antitrust Section proposed that “it should be sufficient for the plan to contain a statement that a customer who cannot take advantage of any of the offerings should contact the seller so that something usable by the customer can be arranged.” But, the Act requires the seller to take such actions as are necessary to provide proportional services and facilities to competing customers.¹⁰ The Antitrust

⁹ See *Freightliner of Knoxville v. Daimler Chrysler Vans, LLC*, 484 F.3d 865 (6th Cir. 2007) (question of fact existed as to whether allegedly discriminatory promotion was paid for by seller or by customer); *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414 (11th Cir. 1990), *reh'g denied*, 929 F.2d 704 (11th Cir. 1991) (“Generally, financing programs do not relate to the resale of the supplier’s goods and therefore are not services and facilities within the meaning of sections 2(d) and (e).”).

¹⁰ See *Alterman Foods, Inc. v. F.T.C.*, 497 F.2d 993, 1001 (5th Cir. 1974) (holding that to avoid unlawful discrimination, “a supplier must not merely be willing, if asked, to make an equivalent

Section comment suggested, in effect, that the seller may shift a part of its statutory burden to the customer. The law does not permit such burden-shifting.¹¹

Section 240.9 – Proportionally equal terms.

Section 240.9 states the core requirement of sections 2(d) and 2(e): that promotional services and allowances should be made available to competing customers on proportionally equal terms. It notes that “[n]o single way to do this is prescribed by law,” and that “[a]ny method that treats competing customers on proportionally equal terms may be used.” At the same time, the Guides explain, “[g]enerally, this can be done most easily by basing the payments made or the services furnished on the dollar volume or on the quantity of the product purchased during a specified period.” But again, the Guides note that “other methods that result in proportionally equal allowances and services being offered to all competing customers are acceptable.”

The Antitrust Section and FMI both urged the Commission to adopt language in the Guides that would explicitly “endorse proportionalization based on the value to the seller of the promotional services rendered.” NGA opposed any such revision and stated that “[t]he Commission is well aware of the numerous subjective factors that make a value standard a slippery slope to price discrimination by sellers for the advantage of power buyers.”

In preparing for its 1990 review of the Guides, the Commission expressly invited comment on alternative standards of proportional equality, including a standard “based on the

deal with other customers, but must take affirmative action to inform them of the availability of the promotion programs”).

¹¹ The Commission has corrected a non-substantive error in the text of section 240.8. The word “describe” has been changed to “described”.

value to the seller of promotions in different media or by different groups of customers, called the ‘seller’s value standard,’ or simply the value standard.” See 55 FR 33655 (Aug. 17, 1990). In reply, the Commission received and carefully considered 210 comments on this issue. The “overwhelming majority” of comments opposed adoption of a seller’s value standard, whereas they generally concluded that the cost-based standard identified in the Guides worked well. “While some [felt] that the adoption of the seller’s value standard might promote the efficient allocation of promotional resources, many considered it contrary to the Act’s purpose of fairness and [thought] it would result in unjustified favorable treatment for large buyers.” 55 FR 33654-33657 (Aug. 17, 1990). The Commission concluded then, as it does now, that “[t]he law may also permit use of the value standard, at least so far as recognizing the varying value of different media for the seller’s promotional efforts.” But the Commission declined to incorporate the seller’s value standard in the 1990 Guides because, “unless carefully monitored, sellers may use elastic, expansive measurements of value which could help disguise persistent, systematic discrimination These concerns . . . counsel against including it in the Guides, which are intended to help businesses comply with the law.” No subsequent changes in fact or law counsel differently now.

The Antitrust Section and FMI pointed to *Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990), by way of suggesting that the Commission’s concerns were unwarranted. In *Hasbrouck*, a majority of the Supreme Court opined that functional discounts “that merely accord due recognition and reimbursement for actual marketing functions” do not violate section 2(a) of the R-P Act, and that such reimbursement might be based on the actual value to the seller of those marketing functions. *Hasbrouck* does not clarify the circumstances under which use of a value

standard would be lawful under sections 2(d) and 2(e). Particularly given the fact that sections 2(d) and 2(e) of the R-P Act were enacted to inhibit evasion of section 2(a) by disguising price discriminations as promotional allowances or services,¹² concern remains that explicit endorsement of the value standard in the Guides might promote imprecision, subjectivity, and “elastic, expansive measurements of value” which might facilitate the concealment of price discrimination, contrary to the intent underlying the Act. Accordingly, the current language of section 240.9 with regard to the standard of proportional treatment is retained.

The Antitrust Section and FMI also urged the Commission to delete Example 4 of section 240.9, which provides that “[a] seller should not identify or feature one or a few customers in its own advertising without making the same service available on proportionally equal terms” to competing customers. The Antitrust Section stated that alternative offers of “useable and suitable” promotional services should be acceptable. The Commission believes that Example 4 is useful because it addresses a commonly furnished promotional service. At the same time, Example 4 may be unduly rigid and confining, especially insofar as proportionally identifying or featuring all competing customers in a seller’s advertising may be impracticable under some circumstances, as where the seller has a few relatively large customers and many relatively small ones. For these reasons, the Commission has revised Example 4 to provide that the seller should “not identify or feature one or a few customers in its own advertising without making the same

¹² See, e.g., *L & L Oil Co., Inc. v. Murphy Oil Corp.*, 674 F. 2d 1113 (5th Cir. 1982) (“[T]he intent of s 2(e) was to end disguised price discriminations in the form of advertising and promotional activities and cooperative merchandising.”) (citing Congressman Patman).

or if impracticable, alternative services available to competing customers on proportionally equal terms... .”¹³

Section 240.10 – Availability to all competing customers.

Section 240.10(a) of the Guides discusses the requirement that a seller take reasonable steps to ensure that offered promotional services and facilities are “useable in a practical sense” by competing customers; *i.e.*, functionally available. Example 1 following section 240.10(a) currently states: “A manufacturer offers a plan for cooperative advertising on radio, TV, or in newspapers of general circulation. Because the purchases of some of the manufacturer’s customers are too small, this offer is not useable in a practical sense by them. The manufacturer should offer them alternative(s) on proportionally equal terms that are useable in a practical sense by them.” Given the rapid development of online retailing, the Commission has revised Example 1 to encourage the making of online promotional alternatives available to online customers (and others) as appropriate. The example is amended by adding to the current text the following: “In addition, some competing customers are online retailers that cannot make practical use of radio, TV, or newspaper advertising. The manufacturer should offer them proportionally equal alternatives, such as online advertising, that are useable by them in a practical sense.”

Section 240.10(b) discusses the requirement that a seller take reasonable steps to provide competing customers with notice of available promotional services and facilities. The Antitrust Section suggested revisions pertaining to use of the Internet to provide customers with notice of the availability of promotional services or allowances. The Antitrust Section stated that the

¹³ The Commission has corrected a nonsubstantive error in the text of section 240.9. The word

section should be revised “to state that it is sufficient for the notice to direct customers to the seller’s website for details of the offer,” and that “website postings” should be added to section 240.10’s non-exhaustive list of acceptable methods of notifying customers about the availability of promotional services and allowances. FMI made a similar suggestion. In addition, the Antitrust Section urged that a retailer be barred from claiming that it did not receive promotional services and allowances if it failed to look at the seller’s website for posted promotional programs.

The R-P Act requires the seller to provide competing customers with proportionally equal promotional services and allowances. The dramatic increase in Internet use by sellers and customers does not justify shifting to customers the burden of learning about sellers’ promotional programs in the first instance, which might require a merchant reselling the products of scores of manufacturers to regularly search scores of websites just to determine whether promotional services and allowances might be available. For that reason, the Guides will continue to provide that the seller must “take steps reasonably designed to provide notice to competing customers of the availability of promotional services and allowances,” as suggested by the non-exhaustive list of acceptable methods of notification contained in section 240.10(b). Acceptable methods listed include, for example, the provision of “information on shipping containers or product packages of the availability and essential features of an offer, identifying a specific source for further information.” This last clause ensures that once customers are put on notice of the availability and essential features of an offer, the details of that offer can be efficiently conveyed without sacrifice of effectiveness. Given the general availability of the Internet to sellers and customers,

“lterms” has been replaced with “terms”.

the “specific source for further information” can be a website posting to which the customer has been directed.

Section 240.11 – Wholesaler or third party performance of seller’s obligations.

Section 240.11 of the Guides provides that a seller may contract with intermediaries to perform some or all of its obligations under sections 2(d) and 2(e) of the R-P Act, but that use of intermediaries does not relieve the seller of its responsibility for compliance with the Act. The Antitrust Section suggested that although a seller may be obliged to monitor and supervise its intermediaries, “it should not be held as a guarantor of its intermediaries’ performance.”

Section 240.11 is retained without change. A seller may work through intermediaries to comply with the R-P Act, but the seller’s obligation to comply with the Act is not itself delegable—the seller remains responsible for compliance in fact.

The Antitrust Section also urged that a new sentence be added to section 240.11, informing intermediaries that they “may be held responsible under Section 5 of the FTC Act for failing to perform.” The current regulatory review is not an appropriate vehicle for assessing or putting forward new theories of liability under section 5 of the FTC Act.

Section 240.13 – Customer’s and third party liability.

Current section 240.13 of the Guides notes that although sections 2(d) and 2(e) apply to a seller and not to its customer, a customer that knows or should know that it is receiving services or allowances not made proportionally available to competing customers may be liable under section 5 of the FTC Act.¹⁴ FMI urged the Commission to modify section 240.13 “to make it

¹⁴ Section 2(f) of the R-P Act condemns knowing inducement or receipt of a price discrimination prohibited by section 2(a). The Act does not have a similar provision condemning knowing inducement or receipt of promotional assistance prohibited by sections 2(d) and 2(e). The

clear that the Commission would not proceed against a buyer [under Section 5] . . . absent evidence of likely injury to competition.”

Likely injury to competition is not an element of seller liability under section 2(d) or 2(e). Similarly, the Commission and some courts have held that a finding of likely injury to competition is not required to establish *buyer liability* under FTC Act section 5 for knowing inducement or receipt of promotional assistance prohibited by section 2(d) or 2(e).¹⁵ FMI questions the soundness of those precedents and urges the Commission to “make it clear” that the Commission would not proceed against a buyer for knowing inducement or receipt “absent evidence of likely injury to competition.”

The Supreme Court has instructed that the Robinson-Patman Act should be construed consistent with antitrust policy generally, which focuses on harm to competition.¹⁶ Likewise, the Commission believes that a finding of an “unfair method of competition” under § 5 should be tethered to likely injury to competition. Accordingly, the Commission has revised section 240.13 of the Guides to state that “where there is likely injury to competition,” the Commission may proceed under § 5 against a customer who knows, or should know, that it is receiving services or allowances not made proportionally available to competing customers.

absence of such a provision has been held to be “more ‘inadvertent’ than ‘studious,’ . . . [t]he practices themselves [having been] declared contrary to the public interest and therefore unlawful.” *Grand Union Co. v. F.T.C.*, 300 F.2d 92, 96-97 (2nd Cir. 1962).

¹⁵ See, e.g., *Grand Union Co. v. F.T.C.*, 300 F.2d 92, 99 (2nd Cir. 1962), *aff’g In re Grand Union Co.*, 57 FTC 382 (August 12, 1960).

¹⁶ See, e.g., *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 181 (2006) (“[W]e . . . resist interpretation [of the R-P Act] geared more to the protection of existing competitors than to the stimulation of competition.”); *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 320 (1962).

Section 240.13(a) contains several illustrative Examples pertaining to a customer's and third-party liability. Example 1 discourages inducement or receipt of advertising allowances for promotion of the seller's product in connection with a customer's new store opening or anniversary sale when the customer knows or should know that proportionally equal allowances, or suitable alternatives, are not available to competing customers. Example 2 discourages inducement or receipt of in-store services—stocking of shelves, building of displays, and rotating of inventory, for example—under similar circumstances. FMI argued that the “suggestion[s] of liability” contained in these examples are unwarranted and discourage efficient competitive conduct. FMI asserted: that Example 1 discourages companies “from developing special or exclusive promotional programs . . . , where such promotions are part of the supplier's overall promotional program”, and that Example 2 similarly discourages companies from seeking to make best use of in-store services by “‘fine-tuning’ them to particular customers or channels,” where alternative services are made available to competing customers as part of the supplier's overall promotional program. FMI's critique, however, does not recognize the fundamental requirement applicable both to sellers that grant and customers that knowingly induce or receive allowances, services, or facilities: as stated in the text of Guide 240.13(a), they must be “made available on proportionally equal terms” to “competitors engaged in the resale of a seller's product.” Examples 1 and 2 do not discourage the development of specialized promotions or the fine-tuning of in-store service programs, where those programs are part of the supplier's overall promotional program *and* that program makes available to competing customers proportionally equal allowances, services, and facilities that are useable as a practical matter. And FMI has not

demonstrated relevant changed facts or law since the Commission last reviewed the Guides.

These Examples to section 240.13 remain valid and useful, and the Guides retain them.

With respect to Example 2, FMI also noted “the importance of in-store follow through,” and then asserted that “[f]ew, if any, suppliers have the resources to provide or pay for personnel for [in-store services for] every customers’ stores,” and that doing so would not “be beneficial to retailers or ultimate consumers.” This last point seems to be less directed at Example 2, which pertains to knowing inducement or receipt of prohibited services and facilities, as at the basic requirement of sections 2(d) and 2(e) that sellers provide services and facilities to competing customers proportionally.

As noted, section 240.13 of the Guides states that sections 2(d) and 2(e) are inapplicable to knowing inducement or receipt of greater-than-proportional promotional assistance, but that the Commission may, where there is likely injury to competition, challenge such conduct under section 5 of the FTC Act (which creates no private right of action). In so saying, section 240.13 may imply that there is no private right of action for knowing inducement or receipt of greater-than-proportional promotional assistance. Some judicial decisions published after the Commission’s 1990 review of the Guides, however, have held that under some circumstances there may be a private right of action for knowing inducement or receipt of discriminatory pricing under § 2(f) of the R-P Act. *See, e.g., American Booksellers Ass’n, Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1068 (N.D. Cal. 2001) (to extent promotional allowances “do not bear a reasonable relationship to [defendants’] actual advertising expenditures, . . . they can be challenged as indirect price discriminations under § 2(a) and § 2(f)”). In its recent request for

public comments, the Commission asked whether the Guides should be revised in light of these decisions.

FMI replied that “the law on this subject is sufficiently clear that no additional discussion is needed in the Guides.” But, FMI added, if the Commission were inclined to so-revise the Guides, it should explain that sections 2(a) and 2(f) of the R-P Act may apply to ostensible promotional allowances only where *no* services are performed in return, or where the payments are not reasonably related to the “customer’s cost of performance *or the value of the promotional service to the supplier.*” (Emphasis in original.) The Antitrust Section appears to have derived a similar standard from its review of recent decisions, but did not comment on the utility of so-revising the Guides.

AAI did not specifically address this question, but stated that the Commission should take account of recent research findings in its review of the Guides. Specifically, AAI noted that researchers have documented that “[r]etailer’s [*sic*] buying power has significantly increased in recent years . . . ,” and that retailers “reportedly ‘exert [discriminatory] buying power over manufacturers’” (Brackets in original; footnotes omitted.)

The Commission concludes that the Guides should be revised to acknowledge the possible applicability of sections 2(a) and 2(f) of the Act to promotional allowances, and the attendant risk of customer enforcement. Doing so is necessary to remedy the Guides’ possible implication to the contrary, and to better assist businesses in complying with the Act, as interpreted by the courts. The Commission agrees with FMI and the Antitrust Section that sections 2(a) and 2(f) are applicable only in limited circumstances. Specifically, the Commission has revised the Guides by adding a new paragraph immediately prior to the Examples in section

240.13(a), as follows: “In addition, the giving or knowing inducement or receipt of proportionally unequal promotional allowances may be challenged under sections 2(a) and 2(f) of the Act, respectively, where no promotional services are performed in return for the payments, or where the payments are not reasonably related to the customer’s cost of providing the promotional services. *See, e.g., American Booksellers Ass’n v. Barnes & Noble*, 135 F. Supp. 2d 1031 (N.D. Cal. 2001); *but see United Magazine Co. v. Murdoch Magazines Distrib., Inc.* 2001 U.S. Dist. Lexis 20878 (S.D.N.Y. 2001). Sections 2(a) and 2(f) of the Act may be enforced by disfavored customers, among others.”

The Commission declines to add a statement that sections 2(a) and 2(f) are inapplicable to promotional allowances where the payments are reasonably related to the value of the promotional service to the initial seller. Neither *American Booksellers* nor other decisions cited by the commenters support adoption of a “seller’s value standard”. *See also* the discussion of the “seller’s value standard” in connection with section 240.9 of the Guides.

240.14 – Meeting competition.

Section 240.14 of the Guides states that a seller may defend against charges that it has violated section 2(d) or 2(e) by showing that the promotional allowances or services in question were provided “in good faith to meet equally high payments or equivalent services offered or supplied by a competing seller. . . .” The Antitrust Section stated that the Commission should modify section 240.14 to “clarify that a supplier can meet the competition offered by a lower priced brand, including a private label brand, when the customer . . . informs the seller that unless the seller offers the allowance or service requested by the reseller, the customer will accept a competitive offer from the lower-priced brand . . . and either eliminate or reduce the

promotional services provided to the seller refusing the request.” The Commission does not believe that such a change is necessary or appropriate.

The Antitrust Section’s comment does not indicate that the applicable law has changed since 1990 or that concrete difficulties have since arisen in the application of section 240.14. Nevertheless, the Antitrust Section asks the Commission to conclude that sellers of higher-priced brands always may discriminate in the provision of promotional allowances or services based only on representations and threats made by buyers of lower-priced alternative goods, including store-brands. Such a sweeping summary disposition would be inconsistent with section 2(b) of the R-P Act, which limits the “meeting competition” defense to instances in which a seller acts “in good faith to meet . . . the services or facilities furnished by a competitor.”¹⁷ Furthermore, the R-P Act “places the burden of establishing the defense on the [seller].”¹⁸ Whether that burden is met depends on “the facts and circumstances of the particular case.”¹⁹ A seller must “show the existence of facts which would lead a reasonable and prudent person to believe that the granting of [the discrimination] would in fact meet the equally [favorable terms] of a competitor.”²⁰ Whether a seller has done so is a question best left for resolution on the totality of

¹⁷ See, e.g., *Hoover Color Corp. v. Bayer Corp.*, 199 F.3d 160, 164 (4th Cir. 1999), in which the court noted that “courts have rarely granted the seller judgment as a matter of law on the basis of the [meeting competition] defense,” citing with approval *Alan’s of Atlanta Inc. v. Minolta Corp.*, 903 F.2d 1414 (11th Cir. 1990).

¹⁸ *Falls City Industries v. Vanco Beverage*, 460 U.S. 428, 451 (1983).

¹⁹ *Id.* at 441, quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978).

²⁰ *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 82 (1979), quoting *FTC v. A.E. Staley Mfg.*, 324 U.S. 746, 759-60 (1945) (discussing the applicability of section 2(b) to discrimination in price).

a developed record.²¹ Further, because the question of the seller's good faith belief "lies at the core of the defense," issues of credibility "are inherently bound up" with claims of meeting competition.²² Again, those issues are best resolved on the totality of a developed record. Amending section 240.14 of the Guides as urged by the Antitrust Section unnecessarily and unwisely would cut short the development of the record in an entire category of proceedings. Thus, the Guides will retain section 240.14 without change.

Conclusion

The Commission has concluded its review of the Guides by retaining the Guides with some amendments. The revised Guides should increase the use and confidence of use by the public in seeking to conduct business in accordance with sections 2(d) and 2(e) of the R-P Act.

List of Subjects in 16 CFR Part 240

Advertising, Promotional allowances and services, Robinson-Patman Act, Trade practices.

For the reasons stated above, the Federal Trade Commission revises 16 CFR part 240 to read as follows:

²¹ See *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414 (11th Cir. 1990). Compare *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37 (7th Cir. 1992), in which the court affirmed summary judgment based on the seller's meeting competition claim, which was supported by evidence of the seller's experience with and evaluation of the credibility of the buyer, the size and reputation of and the threats made by the buyer, pricing otherwise available in the market, etc. The evidence in *Reserve Supply* goes well beyond the predicate facts on which the Antitrust Section would have the Commission summarily authorize wholesale application of the defense.

²² *Alan's of Atlanta, Inc.*, 903 F. 2d at 1425-26.

PART 240 -- GUIDES FOR ADVERTISING ALLOWANCES AND OTHER
MERCHANDISING PAYMENTS AND SERVICES

Sec.

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Authority: Secs. 5, 6, 38 Stat. 719, as amended, 721; 15 U.S.C. 45, 46; 49 Stat. 1526; 15 U.S.C. 13, as amended.

§ 240.1 Purpose of the Guides.

The purpose of these Guides is to provide assistance to businesses seeking to comply with sections 2 (d) and (e) of the Robinson-Patman Act (the "Act"). The guides are based on the language of the statute, the legislative history, administrative and court decisions, and the purposes of the Act. Although the Guides are consistent with the case law, the Commission has sought to provide guidance in some areas where no definitive guidance is provided by the case law. The Guides are what their name implies -- guidelines for compliance with the law. They do not have the force of law. They do not confer any rights on any person and do not operate to bind the FTC or the public.

§ 240.2 Applicability of the law.

(a) The substantive provisions of section 2 (d) and (e) apply only under certain circumstances. Section 2(d) applies only to:

- (1) A seller of products
- (2) Engaged in interstate commerce
- (3) That either directly or through an intermediary
- (4) Pays a customer for promotional services or facilities provided by the customer
- (5) In connection with the resale (not the initial sale between the seller and the customer) of the seller's products

(6) Where the customer is in competition with one or more of the seller's other customers also engaged in the resale of the seller's products of like grade and quality.

(b) Section 2(e) applies only to:

(1) A seller of products

(2) Engaged in interstate commerce

(3) That either directly or through an intermediary

(4) Furnishes promotional services or facilities to a customer

(5) In connection with the resale (not the initial sale between the seller and the customer) of the seller's products

(6) Where the customer is in competition with one or more of the seller's other customers also engaged in the resale of the seller's products of like grade and quality.

(c) Additionally, section 5 of the FTC Act may apply to buyers of products for resale or to third parties. See § 240.13 of these Guides.

§ 240.3 Definition of seller.

Seller includes any person (manufacturer, wholesaler, distributor, etc.) who sells products for resale, with or without further processing. For example, selling candy to a retailer is a sale for resale without processing. Selling corn syrup to a candy manufacturer is a sale for resale with processing.

§ 240.4 Definition of customer.

A *customer* is any person who buys for resale directly from the seller, or the seller's agent or broker. In addition, a "customer" is any buyer of the seller's product for resale who purchases from or through a wholesaler or other intermediate reseller. The word "customer" which is used in section 2(d) of the Act includes "purchaser" which is used in section 2(e).

Note: There may be some exceptions to this general definition of "customer." For example, the purchaser of distress merchandise would not be considered a "customer" simply on the basis of such purchase. Similarly, a retailer purchasing solely from other retailers, or making sporadic purchases from the seller or one that does not regularly sell the seller's product, or that is a type of retail outlet not usually selling such products (e.g., a hardware store stocking a few isolated food items) will not be considered a "customer" of the seller unless the seller has been put on notice that such retailer is selling its product.

Example 1: A manufacturer sells to some retailers directly and to others through wholesalers. Retailer A purchases the manufacturer's product from a wholesaler and resells some of it to Retailer B. Retailer A is a customer of the manufacturer. Retailer B is not a customer unless the fact that it purchases the manufacturer's product is known to the manufacturer.

Example 2: A manufacturer sells directly to some independent retailers, to the headquarters of chains and of retailer-owned cooperatives, and to wholesalers. The manufacturer offers promotional services or allowances for promotional activity to be performed at the retail level. With respect to such services and allowances, the direct-buying independent retailers, the headquarters of the chains and retailer-owned cooperatives, and the wholesaler's independent

retailer customers are customers of the manufacturer. Individual retail outlets of the chains and the members of the retailer-owned cooperatives are not customers of the manufacturer.

Example 3: A seller offers to pay wholesalers to advertise the seller's product in the wholesalers' order books or in the wholesalers' price lists directed to retailers purchasing from the wholesalers. The wholesalers and retailer-owned cooperative headquarters and headquarters of other bona-fide buying groups are customers. Retailers are not customers for purposes of this promotion.

§ 240.5 Definition of competing customers.

Competing customers are all businesses that compete in the resale of the seller's products of like grade and quality at the same functional level of distribution regardless of whether they purchase directly from the seller or through some intermediary.

Example 1: Manufacturer A, located in Wisconsin and distributing shoes nationally, sells shoes to three competing retailers that sell only in the Roanoke, Virginia area. Manufacturer A has no other customers selling in Roanoke or its vicinity. If Manufacturer A offers its promotion to one Roanoke customer, it should include all three, but it can limit the promotion to them. The trade area should be drawn to include retailers who compete.

Example 2: A national seller has direct-buying retailing customers reselling exclusively within the Baltimore area, and other customers within the area purchasing through wholesalers. The seller may lawfully engage in a promotional campaign confined to the Baltimore area, provided that it affords all of its retailing customers within the area the opportunity to participate, including those that purchase through wholesalers.

Example 3: B manufactures and sells a brand of laundry detergent for home use. In one metropolitan area, B's detergent is sold by a grocery store and a discount department store. If these stores compete with each other, any allowance, service or facility that B makes available to the grocery store should also be made available on proportionally equal terms to the discount department store.

§ 240.6 Interstate commerce.

The term "interstate commerce" has not been precisely defined in the statute. In general, if there is any part of a business which is not wholly within one state (for example, sales or deliveries of products, their subsequent distribution or purchase, or delivery of supplies or raw materials), the business may be subject to sections 2(d) and 2(e) of the Act. (The commerce standard for sections 2 (d) and (e) is at least as inclusive as the commerce standard for section 2(a).) Sales or promotional offers within the District of Columbia and most United States possessions are also covered by the Act.

§ 240.7 Services or facilities.

The terms "services" and "facilities" have not been exactly defined by the statute or in decisions. One requirement, however, is that the services or facilities be used primarily to promote the resale of the seller's product by the customer. Services or facilities that relate primarily to the original sale are covered by section 2(a). The following list provides some examples -- the list is not exhaustive -- of promotional services and facilities covered by sections 2 (d) and (e):

Cooperative advertising;

Handbills;

Demonstrators and demonstrations;

Catalogues;

Cabinets;

Displays;

Prizes or merchandise for conducting promotional contests;

Special packaging, or package sizes; and

Online advertising.

Example 1: A seller offers a supermarket chain an allowance of \$500 per store to stock a new packaged food product and find space for it on the supermarket's shelves and a further allowance of \$300 per store for placement of the new product on prime display space, an aisle endcap. The \$500 allowance relates primarily to the initial sale of the product to the supermarket chain, and therefore should be assessed under section 2(a) of the Act. In contrast, the \$300 allowance for endcap display relates primarily to the resale of the product by the supermarket chain, and therefore should be assessed under section 2(d).

Example 2: During the Halloween season, a seller of multi-packs of individually wrapped candy bars offers to provide those multi-packs to retailers in Halloween-themed packaging. The primary purpose of the special packaging is to promote customers' resale of the candy bars. Therefore, the special packaging is a promotional service or facility covered by section 2(d) or 2(e) of the Act.

Example 3: A seller of liquid laundry detergent ordinarily packages its detergent in containers having a circular footprint. A customer asks the seller to furnish the detergent to it in special packaging having a square footprint, so that the customer can more efficiently warehouse and transship the detergent. Because the purpose of the special packaging is primarily to promote the original sale of the detergent to the customer and not its resale by the customer, the special packaging is not a promotional service or facility covered by section 2(d) or 2(e) of the Act.

§ 240.8 Need for a plan.

A seller who makes payments or furnishes services that come under the Act should do so according to a plan. If there are many competing customers to be considered or if the plan is complex, the seller would be well advised to put the plan in writing. What the plan should include is described in more detail in the remainder of these Guides. Briefly, the plan should make payments or services functionally available to all competing customers on proportionally equal terms. (See § 240.9 of this part.) Alternative terms and conditions should be made available to customers who cannot, in a practical sense, take advantage of any of the plan's offerings. The seller should inform competing customers of the plans available to them, in time for them to decide whether to participate. (See § 240.10 of this part.)

§ 240.9 Proportionally equal terms.

(a) Promotional services and allowances should be made available to all competing customers on proportionally equal terms. No single way to do this is prescribed by law. Any method that treats competing customers on proportionally equal terms may be used. Generally,

this can be done most easily by basing the payments made or the services furnished on the dollar volume or on the quantity of the product purchased during a specified period. However, other methods that result in proportionally equal allowances and services being offered to all competing customers are acceptable.

(b) When a seller offers more than one type of service, or payments for more than one type of service, all the services or payments should be offered on proportionally equal terms. The seller may do this by offering all the payments or services at the same rate per unit or amount purchased. Thus, a seller might offer promotional allowances of up to 12 cents a case purchased for expenditures on either newspaper or Internet advertising or handbills.

Example 1: A seller may offer to pay a specified part (e.g., 50 percent) of the cost of local advertising up to an amount equal to a specified percentage (e.g., 5 percent) of the dollar volume of purchases during a specified period of time.

Example 2: A seller may place in reserve for each customer a specified amount of money for each unit purchased, and use it to reimburse these customers for the cost of advertising the seller's product.

Example 3: A seller should not provide an allowance or service on a basis that has rates graduated with the amount of goods purchased, as, for instance, 1 percent of the first \$1,000 purchased per month, 2 percent of the second \$1,000 per month, and 3 percent of all over that.

Example 4: A seller should not identify or feature one or a few customers in its own advertising without making the same, or if impracticable, alternative services available on proportionally equal terms to customers competing with the identified customer or customers.

Example 5: A seller who makes employees available or arranges with a third party to furnish personnel for purposes of performing work for a customer should make the same offer available on proportionally equal terms to all other competing customers or offer useable and suitable services or allowances on proportionally equal terms to competing customers for whom such services are not useable and suitable.

Example 6: A seller should not offer to pay a straight line rate for advertising if such payment results in a discrimination between competing customers; e.g., the offer of \$1.00 per line for advertising in a newspaper that charges competing customers different amounts for the same advertising space. The straight line rate is an acceptable method for allocating advertising funds if the seller offers small retailers that pay more than the lowest newspaper rate an alternative that enables them to obtain the same percentage of their advertising cost as large retailers. If the \$1.00 per line allowance is based on 50 percent of the newspaper's lowest contract rate of \$2.00 per line, the seller should offer to pay 50 percent of the newspaper advertising cost of smaller retailers that establish, by invoice or otherwise, that they paid more than that contract rate.

Example 7: A seller offers each customer promotional allowances at the rate of one dollar for each unit of its product purchased during a defined promotional period. If Buyer A purchases 100 units, Buyer B 50 units, and Buyer C 25 units, the seller maintains proportional equality by allowing \$100 to Buyer A, \$50 to Buyer B, and \$25 to Buyer C, to be used for the Buyers' expenditures on promotion.

§ 240.10 Availability to all competing customers.

(a) *Functional availability.* (1) The seller should take reasonable steps to ensure that services and facilities are useable in a practical sense by all competing customers. This may require offering alternative terms and conditions under which customers can participate. When a seller provides alternatives in order to meet the availability requirement, it should take reasonable steps to ensure that the alternatives are proportionally equal, and the seller should inform competing customers of the various alternative plans.

(2) The seller should insure that promotional plans or alternatives offered to retailers do not bar any competing retailers from participation, whether they purchase directly from the seller or through a wholesaler or other intermediary.

(3) When a seller offers to competing customers alternative services or allowances that are proportionally equal and at least one such offer is useable in a practical sense by all competing customers, and refrains from taking steps to prevent customers from participating, it has satisfied its obligation to make services and allowances "functionally available" to all customers. Therefore, the failure of any customer to participate in the program does not place the seller in violation of the Act.

Example 1: A manufacturer offers a plan for cooperative advertising on radio, TV, or in newspapers of general circulation. Because the purchases of some of the manufacturer's customers are too small this offer is not useable in a practical sense by them. The manufacturer should offer them alternative(s) on proportionally equal terms that are useable in a practical sense by them. In addition, some competing customers are online retailers that cannot make

practical use of radio, TV, or newspaper advertising. The manufacturer should offer them proportionally equal alternatives, such as online advertising, that are useable by them in a practical sense.

Example 2: A seller furnishes demonstrators to large department store customers. The seller should provide alternatives useable in a practical sense on proportionally equal terms to those competing customers who cannot use demonstrators. The alternatives may be services useable in a practical sense that are furnished by the seller, or payments by the seller to customers for their advertising or promotion of the seller's product.

Example 3: A seller offers to pay 75 percent of the cost of advertising in daily newspapers, which are the regular advertising media of the seller's large or chain store customers, but a lesser amount, such as only 50 percent of the cost, or even nothing at all, for advertising in semi-weekly, weekly, or other newspapers or media, such as the Internet, that may be used by small retail customers. Such a plan discriminates against particular customers or classes of customers. To avoid that discrimination, the seller in offering to pay allowances for newspaper advertising should offer to pay the same percent of the cost of newspaper advertising for all competing customers in a newspaper of the customer's choice, or at least in those newspapers that meet the requirements for second class mail privileges. While a small customer may be offered, as an alternative to advertising in daily newspapers, allowances for other media and services such as envelope stuffers, handbills, window banners, websites, and the like, the small customer should have the choice to use its promotional allowance for advertising similar to that available to the larger customers, if it can practicably do so.

Example 4: A seller offers short term displays of varying sizes, including some which are useable by each of its competing customers in a practical business sense. The seller requires uniform, reasonable certification of performance by each customer. Because they are reluctant to process the required paper work, some customers do not participate. This fact does not place the seller in violation of the functional availability requirement and it is under no obligation to provide additional alternatives.

(b) *Notice of available services and allowance.*: The seller has an obligation to take steps reasonably designed to provide notice to competing customers of the availability of promotional services and allowances. Such notification should include enough details of the offer in time to enable customers to make an informed judgment whether to participate. When some competing customers do not purchase directly from the seller, the seller must take steps reasonably designed to provide notice to such indirect customers. Acceptable notification may vary. The following is a non-exhaustive list of acceptable methods of notification:

- (1) By providing direct notice to customers;
- (2) When a promotion consists of providing retailers with display materials, by including the materials within the product shipping container;
- (3) By including brochures describing the details of the offer in shipping containers;
- (4) By providing information on shipping containers or product packages of the availability and essential features of an offer, identifying a specific source for further information;

(5) By placing at reasonable intervals in trade publications of general and widespread distribution announcements of the availability and essential features of promotional offers, identifying a specific source for further information; and

(6) If the competing customers belong to an identifiable group on a specific mailing list, by providing relevant information of promotional offers to customers on that list. For example, if a product is sold lawfully only under Government license (alcoholic beverages, etc.), the seller may inform only its customers holding licenses.

(c) A seller may contract with intermediaries or other third parties to provide notice. See § 240.11.

Example 1: A seller has a plan for the retail promotion of its product in Philadelphia. Some of its retailing customers purchase directly and it offers the plan to them. Other Philadelphia retailers purchase the seller's product through wholesalers. The seller may use the wholesalers to reach the retailing customers that buy through them, either by having the wholesalers notify these retailers, or by using the wholesalers' customer lists for direct notification by the seller.

Example 2: A seller that sells on a direct basis to some retailers in an area, and to other retailers in the area through wholesalers, has a plan for the promotion of its product at the retail level. If the seller directly notifies competing direct purchasing retailers, and competing retailers purchasing through the wholesalers, the seller is not required to notify its wholesalers.

Example 3: A seller regularly promotes its product at the retail level and during the year has various special promotional offers. The seller's competing customers include large direct-purchasing retailers and smaller retailers that purchase through wholesalers. The promotions

offered can best be used by the smaller retailers if the funds to which they are entitled are pooled and used by the wholesalers on their behalf (newspaper advertisements, for example). If retailers purchasing through a wholesaler designate that wholesaler as their agent for receiving notice of, collecting, and using promotional allowances for them, the seller may assume that notice of, and payment under, a promotional plan to such wholesaler constitutes notice and payment to the retailer. The seller must have a reasonable basis for concluding that the retailers have designated the wholesaler as their agent.

§ 240.11 Wholesaler or third party performance of seller's obligations.

A seller may contract with intermediaries, such as wholesalers, distributors, or other third parties, to perform all or part of the seller's obligations under sections 2(d) and (e). The use of intermediaries does not relieve a seller of its responsibility to comply with the law. Therefore, in contracting with an intermediary, a seller should ensure that its obligations under the law are in fact fulfilled.

§ 240.12 Checking customer's use of payments.

The seller should take reasonable precautions to see that the services the seller is paying for are furnished and that the seller is not overpaying for them. The customer should expend the allowance solely for the purpose for which it was given. If the seller knows or should know that what the seller is paying for or furnishing is not being properly used by some customers, the improper payments or services should be discontinued.

§ 240.13 Customer's and third party liability.

(a) *Customer's liability.* Sections 2 (d) and (e) apply to sellers and not to customers.

However, where there is likely injury to competition, the Commission may proceed under section 5 of the Federal Trade Commission Act against a customer who knows, or should know, that it is receiving a discriminatory price through services or allowances not made available on proportionally equal terms to its competitors engaged in the resale of a seller's product. Liability for knowingly receiving such a discrimination may result whether the discrimination takes place directly through payments or services, or indirectly through deductions from purchase invoices or other similar means. In addition, the giving or knowing inducement or receipt of proportionally unequal promotional allowances may be challenged under sections 2(a) and 2(f) of the Act, respectively, where no promotional services are performed in return for the payments, or where the payments are not reasonably related to the customer's cost of providing the promotional services. *See, e.g., American Booksellers Ass'n v. Barnes & Noble*, 135 F. Supp. 2d 1031 (N.D. Cal. 2001); *but see United Magazine Co. v. Murdoch Magazines Distrib., Inc.* 2001 U.S. Dist. Lexis 20878 (S.D.N.Y. 2001). Sections 2(a) and 2(f) of the Act may be enforced by disfavored customers, among others.

Example 1: A customer should not induce or receive advertising allowances for special promotion of the seller's product in connection with the customer's anniversary sale or new store opening when the customer knows or should know that such allowances, or suitable alternatives, are not available on proportionally equal terms to all other customers competing with it in the distribution of the seller's product.

Example 2: Frequently the employees of sellers or third parties, such as brokers, perform in-store services for their grocery retailer customers, such as stocking of shelves, building of displays and checking or rotating inventory, etc. A customer operating a retail grocery business should not induce or receive such services when the customer knows or should know that such services (or usable and suitable alternative services) are not available on proportionally equal terms to all other customers competing with it in the distribution of the seller's product.

Example 3: Where a customer has entered into a contract, understanding, or arrangement for the purchase of advertising with a newspaper or other advertising medium, such as the Internet, that provides for a deferred rebate or other reduction in the price of the advertising, the customer should advise any seller from whom reimbursement for the advertising is claimed that the claimed rate of reimbursement is subject to a deferred rebate or other reduction in price. In the event that any rebate or adjustment in the price is received, the customer should refund to the seller the amount of any excess payment or allowance.

Example 4: A customer should not induce or receive an allowance in excess of that offered in the seller's advertising plan by billing the seller at "vendor rates" or for any other amount in excess of that authorized in the seller's promotional program.

(b) *Third party liability.* Third parties, such as advertising media, may violate section 5 of the Federal Trade Commission Act through double or fictitious rates or billing. An advertising medium, such as the Internet, a newspaper, broadcast station, or printer of catalogues, that publishes a rate schedule containing fictitious rates (or rates that are not reasonably expected to be applicable to a representative number of advertisers), may violate section 5 if the customer uses such deceptive schedule or invoice for a claim for an advertising allowance, payment or

credit greater than that to which it would be entitled under the seller's promotional offering.

Similarly, an advertising medium that furnishes a customer with an invoice that does not reflect the customer's actual net advertising cost may violate section 5 if the customer uses the invoice to obtain larger payments than it is entitled to receive.

Example 1: A newspaper has a "national" rate and a lower "local" rate. A retailer places an advertisement with the newspaper at the local rate for a seller's product for which the retailer will seek reimbursement under the seller's cooperative advertising plan. The newspaper should not send the retailer two bills, one at the national rate and another at the local rate actually charged.

Example 2: A newspaper has several published rates. A large retailer has in the past earned the lowest rate available. The newspaper should not submit invoices to the retailer showing a high rate by agreement between them unless the invoice discloses that the retailer may receive a rebate and states the amount (or approximate amount) of the rebate, if known, and if not known, the amount of rebate the retailer could reasonably anticipate.

Example 3: A radio station has a flat rate for spot announcements, subject to volume discounts. A retailer buys enough spots to qualify for the discounts. The station should not submit an invoice to the retailer that does not show either the actual net cost or the discount rate.

Example 4: An advertising agent buys a large volume of newspaper advertising space at a low, unpublished negotiated rate. Retailers then buy the space from the agent at a rate lower than they could buy this space directly from the newspaper. The agent should not furnish the retailers invoices showing a rate higher than the retailers actually paid for the space.

§ 240.14 Meeting competition.

A seller charged with discrimination in violation of sections 2 (d) and (e) may defend its actions by showing that particular payments were made or services furnished in good faith to meet equally high payments or equivalent services offered or supplied by a competing seller. This defense is available with respect to payments or services offered on an area-wide basis, to those offered to new as well as old customers, and regardless of whether the discrimination has been caused by a decrease or an increase in the payments or services offered. A seller must reasonably believe that its offers are necessary to meet a competitor's offer.

§ 240.15 Cost justification.

It is no defense to a charge of unlawful discrimination in the payment of an allowance or the furnishing of a service for a seller to show that such payment or service could be justified through savings in the cost of manufacture, sale or delivery.

By direction of the Commission.

Donald S. Clark
Secretary.

[FR Doc. 2014-23137 Filed 09/26/2014 at
8:45 am; Publication Date: 09/29/2014]